



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

August 5, 1998

The Honorable John M. McHugh
Chairman, Subcommittee on the Postal Service
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your request for views on possible modifications to H.R. 22, the "Postal Reform Act of 1997." We apologize for any misunderstanding about the need for a written response to your letter. It was our understanding that the Antitrust Division would provide informal technical assistance in lieu of written comments, at least until such time as the Subcommittee had decided whether to go forward with the proposed revisions. The Department of Justice typically does not provide written comments on policy proposals. Given these circumstances, our comments also are preliminary and subject to modification.

As you requested, our comments at this time address only matters pertaining to competition policy and antitrust enforcement. These comments also should be read in harmony with the views of the Treasury Department, which has notified you of the concerns it has with other parts of the proposal.

The Department of Justice supports a careful examination of the various policy interests that would be affected by redefining the scope of the Federal postal monopoly. In proceedings before the Postal Rate Commission, the Department has argued in support of a narrow construction of the private express statutes and against administrative actions that would have the effect of enlarging the scope of the monopoly. We also have questioned the characterization of the postal monopoly as a "natural monopoly," noting that the United States Postal Service's ("USPS") entry into competitive markets suggests that economic theory does not justify the postal monopoly as it exists under current law.

As the Federal agency responsible for ensuring the observance of free-market principles, the Department of Justice generally disfavors the creation of statutory exceptions to the Federal antitrust laws. In our view, Federal antitrust objectives are best served when the Federal antitrust laws are

applied equally and universally. It is our longstanding position that statutory exemptions to the Federal antitrust laws are justified only when the Government's strong interest in the preservation of competitive markets is displaced by a compelling social policy objective of greater weight.

Assuming a policy basis for reducing the scope of the statutory postal monopoly, we would support legislation that clarified the application of the Federal antitrust laws to activities of the USPS falling outside of the statutory monopoly. Unlike a regulatory oversight regime, antitrust enforcement generally provides a minimally intrusive but efficient and effective deterrent against unreasonable restraints of trade. In addition, expanded application of the Federal antitrust laws would foster a greater awareness of antitrust requirements and promote the observance of competitive principles.

We understand that regulated industries often present unique challenges to antitrust enforcement and it is possible that the significant regulatory overlay contemplated in H.R. 22 and proposals like it may present significant obstacles to efficient antitrust enforcement or prove ineffective in simulating competitive market conditions. For example, the current proposal contemplates a statutory requirement for cost-based pricing as a safeguard against predatory pricing. To the extent that cost accounting procedures are accurate, this is likely to deter predation effectively, based on current Federal antitrust enforcement concepts. However, if cost accounting procedures and allocation methodologies are not reliable, cost-based pricing requirements are less likely to deter predatory pricing and might be used to defend against meritorious antitrust charges.

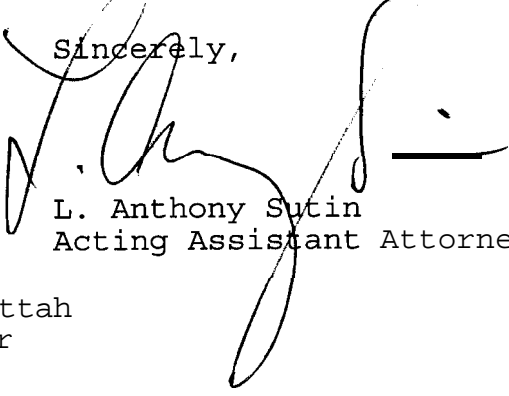
Turning to some of the specific proposed changes, we support the suggested restatement of antitrust jurisdiction as it applies to USPS activities. The current formula is overly narrow and may fail to incorporate conduct that clearly would come under antitrust scrutiny but for the narrow definition. We also support appropriate proposals to limit the scope of the postal monopoly. We believe there is value to the idea of a simple, bright-line test for identifying products falling within the statutory monopoly. We cannot determine at this time whether the \$2 price threshold would work well in all instances and we note the need for a mechanism to adjust for inflation, if it were adopted.

We are not prepared at this time to comment on the proposals for amendments to Federal laws thought to confer an undue competitive advantage on the USPS at the expense of its competitors in the private sector. However, we do not agree that a mere perception of undue advantage provides a sufficient basis on which to proceed with reforms of this type. Moreover, we are

not prepared to say that competition policy would require a "correction" in every instance of actual preference. A critical first step is to understand how actions carried out in the name of competition policy reform would affect other relevant policy and law enforcement interests. In our view, this sensitive and complicated policy analysis will prove not to be amenable to the reporting requirement contemplated in the proposed revision.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of further assistance. The Office of Management and Budget has advised us that from the standpoint of the Administration's program, there is no objection to the presentation of these preliminary views.

Sincerely,



L. Anthony Sutin
Acting Assistant Attorney General

cc: The Honorable Chaka Fattah
Ranking Minority Member